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Legal Issues of Electronic Commerce

by Séverine Dusollier

In its recent Communication on Electronic Commerce, the European Commission stressed that “in order to allow for electronic commerce operators to reap the full benefits of the Single Market, it is essential to avoid regulatory inconsistencies and to ensure a coherent legal and regulatory framework for electronic commerce”. The types of pitfalls that are facing any company or person wanting to set up a distance selling activity on the Internet, offering goods or services to consumers and businesses located world wide are numerous, they vary according to the type of relation you are considering entering (consumer, business), and according to the legal framework you are accustomed to operating in. To make things even more difficult, the answers are often unclear, non existent, contradictory and constitute real obstacles to conducting a commercial activity on the network.

The legal framework we are operating in is increasingly becoming complex and burdensome in one single jurisdiction alone, let alone when you are faced simultaneously with hundreds of potentially applicable legislations because you are entering agreements with customers located anywhere in the world. Besides, a number of companies and consumers are still unaware of the legal constraints they may encounter by entering electronic transactions. The objective of this present draft is to fill this gap by providing an overview of relevant legal issues raised by the development of electronic commerce.

Taxation Law

- What criteria may be used to associate on line transactions with the territory of a country?**
- How can double taxation be prevented?**

- How do the direct taxes rules apply in an electronic environment, both for businesses and for individuals?
- Do general taxation, VAT and custom duties regimes apply to electronic transactions?
- What is the nature of supplies on the Internet? Are the products delivered electronically goods or services?
- How can digital documents comply with existing administrative requirements to keep written evidence of commercial operation and registration in accountancy?
- How can the place and the time of the supply be determined?
- Are electronic transactions exports or imports pursuant the European VAT directives?

Electronic Payments

- What are the existing advantages and obstacles to introducing technical systems that enable electronic payments in an electronic transaction?
- Are banking regulations applicable to issuers of cybercash and cyber credit cards? Does such electronic cash constitute legal tender?
- How can credit cards and other electronic payments satisfy the legal requirements in electronic environments?
- How can privacy, consumer protection and bank secrecy be fulfilled in an electronic banking relationship?
- What is the situation concerning the use of electronic negotiable documents?

Contract Law and Evidence

- Which are the nature, parties and subject matter of the contracts?
- How to enter contracts electronically?
- What is the value of an electronic document and a digital signature?
- Where and when does the offer take place?
- What are the terms and conditions governing the contract?

Liability

- What type of liability could the various actors (service provider, access provider, TTP, seller, banking institution,...) involved in the offering of goods or services face?

- What type of damages are covered?
- What are the causes of liability?

Intellectual Property Rights

- How to protect a web site, a domain name, a trade mark or any other type of intellectual property right against illegal misappropriation?
- How to control the use of protected material on the global infrastructure?
- Which rights are concerned when downloading, viewing or printing a protected work? Is there a exhaustion of rights?
- How can the rightholder expect to obtain remuneration?
- How can his moral rights be ensured?
- How should licence agreements be drafted?
- What is the legal protection of the integrity of ECMS?
- Is it possible to detect illegal use?
- Who can be considered as liable in case of copyright or trade mark infringement?

Consumer Protection

- What general or specific rules must be respected when entering a contract with a consumer or when advertising a product?
- What is the regulation of offers and marketing practices?
- What are the abusive terms of a contract?
- What type of information has to be included in a web site?
- How are the distance selling contracts regulated?
- What is the regulation of product and services liability and of products labelling and packaging?
- How can consumers have easy access to jurisdiction and which are the possibilities for consumer associations to defend consumers interests?

Privacy Issues

- What are the applicable general and specific legislations?
- Can personal data be transferred?
- What are the technical developments currently undertaken to improve the protection of privacy on the Internet?

How do they comply with privacy provisions?

International Private Law

- What are the competent jurisdictions and the applicable law in the following matters: Contracts, Liability, Intellectual property Rights, Marketing and competition law, electronic payments and banking issues
- What are the specific mandatory criteria in the context of consumer protection?
- How can a jurisdictional decision be enforced in another country?
- Is on-line litigation and arbitration in commercial cases relevant?

Legislative developments are facing a new challenge brought on by the rapid development of the on-line technology and by the newly created difficulty of applying existing regulations in a networked environment. Simultaneously, technology provides more and more solutions to the threats created by the emergence of this new technology. Lawyers and technicians can no longer consider each other as enemies but have to collaborate. Technology and law must develop along each other's progress and integrate mutual input. Such connections between both already exist in a number of fields. Many examples may be mentioned such as TTPs, Privacy Enhancing Technology, ECMS, etc. Systems as PICS can also be applied to a growing number of fields, such as protection of copyright, protection of minors, consumers, etc.

Forthcoming legislative initiatives will necessarily have to encounter these technical solutions in order to address regulatory responses to the growth of electronic commerce.

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